No. 02-742

IN THE

Supreme Court of the United States

MEDICAL AIR TECHNOLOGY CORPORATION,

Petitioner,

v.

MARWAN INVESTMENT, INC.,
MARWANI HOLDING COMPANY, N.V.,
MULTIFINANCE HOLDING CORPORATION, AND
DR. K. PHILIP RAHBANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

MARY JO JOHNSON
Counsel of Record
JAMES W. PRENDERGAST
MICHAEL G. BONGIORNO
PETER J. KOLOVOS
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000

Counsel for Respondents

Dated: December 13, 2002

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED FOR REVIEW

Whether this Honorable Court should review the judgment of the Court of Appeals for the First Circuit affirming the District Court's post-trial judgment that Petitioner Medical Air Technology Corporation ("Medical Air") failed to demonstrate that Respondent Marwani Holding Company, N.V. ("Marwani Holding") had breached its fiduciary duty by voting against a proposed merger between Medical Air and a third party, where (1) the judgment of the Court of Appeals rests solely on the application of Massachusetts state law, (2) the questions presented in the Petition are not outcome determinative, given the Court of Appeals' conclusion that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," (3) ample evidence supports that determination, and (4) the Court of Appeals never decided the only federal question that the Petition purports to present — whether the District Court erred in striking Medical Air's jury demand.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the Respondents respectfully submit this disclosure statement.

1. Respondent Marwan Investment, Inc. is a Delaware corporation. Marwan Investment, Inc. is wholly-owned by Sarah Financial Limited, a Delaware corporation, which in turn is wholly-owned by Hamda Investment, N.V., a Netherlands Antilles corporation. Hamda Investment, N.V. is wholly-owned by Multifinance Investment and Holding, S.A., a Luxembourg corporation. No publicly-held company owns 10% or more of the stock of any of the above-listed entities.

2. Respondent Marwani Holding Company, N.V. is a Netherlands Antilles corporation. Marwani Holding Company, N.V. is wholly-owned by Multifinance Investment and Holding, S.A., a Luxembourg corporation. No publicly-held company owns 10% or more of the stock of any of the above-listed entities.

3. Respondent Multifinance Holding Corporation is a Delaware corporation. Multifinance Holding Corporation is wholly-owned by Sarah Financial Limited, a Delaware corporation, which in turn is wholly-owned by Hamda Investment, N.V., a Netherlands Antilles corporation. Hamda Investment, N.V. is wholly-owned by Multifinance Investment and Holding, S.A., a Luxembourg corporation. No publicly-held company owns 10% or more of the stock of any of the above-listed entities.

4. Respondent Dr. K. Philip Rahbany is an individual.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 7

A. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT ANY ISSUE WORTHY OF SUPREME COURT REVIEW. 7

1. The Judgment of the Court of Appeals Rests Entirely on State Law. 8

2. The Questions Presented in the Petition Are Not Outcome Determinative, As the Judgment of the Court of Appeals Rests on Independent Grounds. 8

3. The Petition's Claims of Misapplication of Properly Stated Massachusetts Law and Erroneous Factual Findings Are Inaccurate and Would Not Merit This Court's Intervention Regardless. 10

4. The Court of Appeals Did Not Decide the Sole Federal Question Raised in the Petition, and the Question Does Not Require Resolution or Clarification in Any Event. 12

B. THE DECISION OF THE COURT OF APPEALS IS CORRECT. 14

CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

Blank v. Chelmsford Ob/Gyn, P.C.,
420 Mass. 404, 649 N.E.2d 1102
(1995) 16n, 17n

Clark v. Rowe,
428 Mass. 339, 701 N.E.2d 624
(1998) 18

Donahue v. Rodd Electrotype Co.,
367 Mass. 578, 328 N.E.2d 505
(1975) 14, 16n

Leasing Service Corp. v. Crane,
804 F.2d 828 (4th Cir. 1986) 13n

Merola v. Exergen Corp.,
423 Mass. 461, 668 N.E.2d 351
(1996) 17n

Telum, Inc. v. E.F. Hutton Credit Corp.,
859 F.2d 835 (10th Cir. 1988) 13n

United States v. United Foods, Inc.,
533 U.S. 405 (2001) 18n

Wilkes v. Springside Nursing Home, Inc.,
370 Mass. 842, 353 N.E.2d 657
(1976) 11n, 14, 17n

Zimmerman v. Bogoff,
402 Mass. 650, 524 N.E.2d 849
(1988) 14

SUPREME COURT RULES:

Rule 10 11

BRIEF IN OPPOSITION

The Respondents, Marwan Investment, Inc. ("Marwan Investment"), Marwani Holding Company, N.V. ("Marwani Holding"), Multifinance Holding Corporation ("Multifinance"), and Dr. K. Philip Rahbany ("Rahbany"), respectfully oppose the Petition ("Pet.") filed by Medical Air Technology Corporation ("Medical Air") for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit in this case.

This action involves the application of settled principles of Massachusetts law on breach of fiduciary duty. The central matter in the lawsuit concerns the vote of a minority shareholder, Marwani Holding, regarding a proposed merger between Medical Air and a third party, Nortek, Inc. ("Nortek"). The Petition fails to present any issue of recurring importance or involving a conflict with decisions of this Court or other courts of appeal. In fact, given the Court of Appeals' holding that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," Pet. App. at 20a, the questions presented in the Petition would not change the outcome in this case. Indeed, the sole federal question that the Petition attempts to present — whether the District Court erred in striking Medical Air's jury demand — was not even decided by the Court of Appeals.

The Petition represents nothing more than Medical Air's dissatisfaction with the Court of Appeals' application of properly stated Massachusetts law. Because the decision of the Court of Appeals is not only unworthy of review but also clearly correct, the Petition should be denied.

STATEMENT OF THE CASE

This case arises out of a $1.375 million investment that Marwan Investment and Marwani Holding made in Medical Air pursuant to a January 22, 1996 Investment and Stockholders Agreement (the "ISA"), a Secured Promissory Note (the "Note"), and a Security Agreement. As the District Court held in January, 1998, when it granted partial summary judgment to the Respondents — a judgment which Medical Air has never challenged on appeal — Medical Air failed in May, 1996, to maintain certain minimum financial covenants of the ISA, which triggered an Event of Default. After reserving their rights in light of Medical Air's default, Marwan Investment and Marwani Holding (defined collectively in the ISA as the "Investors") forebore from the exercise of their security rights while Medical Air pursued negotiations of a potential merger with Nortek that would "take out" the Investors' interests in Medical Air. When Medical Air presented a draft merger agreement to its shareholders (including Marwani Holding) for approval, without having reached agreement on material terms of the proposed merger (including the purchase price, which was being renegotiated at Nortek's insistence), Marwani Holding voted against it. Medical Air and Nortek continued their negotiations, but never presented a further proposal to Medical Air's shareholders for consideration.[1]

---

[1] Contrary to Medical Air's assertion that Marwani Holding and Marwan Investment each was "pursuing its remedies against Medical Air" as of the date of the vote on the merger (Pet. at 16), and that the vote "paved the way" for the foreclosure (id. at 5 n.2), the record demonstrates that the Investors continued to forbear in the exercise of their security rights until August, 1998 — nineteen months after the January 8, 1997 vote on the merger, sixteen months after Medical Air commenced this action, and seven months after the District Court found that Medical Air had defaulted under the ISA — when, with no acquisition offer

Although Medical Air and Nortek never reached final agreement on merger terms, Medical Air has for the past five years pursued claims against Marwani Holding based on its vote against the proposed merger, which, according to Medical Air, "thwarted that merger." Pet. at 12. In particular, Medical Air contended at trial, *inter alia*, that by voting against the proposed merger, Marwani Holding breached the fiduciary duty it owed under Massachusetts law as a minority shareholder in a closely-held corporation. The District Court conducted a four-day trial in this matter in January, 2001. The District Court issued its post-trial Findings of Fact and Conclusions of Law in an August 21, 2001 Memorandum (Pet. App. at 29a-48a), in which it addressed and, in turn, rejected each of Medical Air's claims. The District Court then entered judgment for Marwan Investment on its Counterclaim against Medical Air for $1,015,236 accrued under the unpaid Note from Medical Air, plus post-trial interest. Id. at 27a-28a.

Medical Air raised two issues on its appeal to the Court of Appeals for the First Circuit: whether the District Court erred (1) by striking Medical Air's jury demand, or (2) by finding as a matter of fact, after trial, that Marwani Holding had not breached its fiduciary duty to Medical Air. The Court of Appeals determined that it was unnecessary to reach the former issue in order to resolve Medical Air's appeal,

---

pending, and none contemplated, Marwan Investment finally began foreclosure proceedings against Medical Air's assets. Pet. App. at 9a. Marwan Investment foreclosed on all of Medical Air's tangible and intangible assets at a duly noticed public auction, conducted on November 6, 1998. At the public auction, Marwan Investment purchased all of Medical Air's remaining assets with a credit bid deducted from the amounts Medical Air owed to Marwan Investment, without objection from the Medical Air officers and directors who attended the auction. Id. at 9a.

because the District Court's judgment could be affirmed in its entirety on independent, state law grounds:

> We do not, though, need to decide the [jury waiver] issue. As we hold below, no reasonable jury could find liability for breach of fiduciary duty against Marwani Holding nor a causal link between Marwani Holding's vote at the January 8 board meeting and the failure of the proposed merger with Nortek.
>
> Because the core ruling is correct and none of Medical Air's claims could survive a motion for judgment as a matter of law, the jury waiver question is no longer viable.

Id. at 15a.

Turning to Medical Air's fiduciary duty claim, the Court of Appeals recognized that, under Massachusetts law, a shareholder in a close corporation may defeat a claim for breach of fiduciary duty by demonstrating a legitimate business purpose for its actions. Id. at 15a-16a. The Court of Appeals then determined that the evidence presented at trial more than sufficiently supported the District Court's finding that Marwani Holding had legitimate business reasons for voting against the proposed Nortek merger. In particular, the Court of Appeals found that Medical Air's refusal for almost two months to comply with Marwani Holding's repeated requests for basic information about the proposed merger (despite Medical Air's contractual obligation to do so under the ISA) not only led Marwani Holding to question the viability of the deal, but also left it without basic information that it needed to cast an informed vote on the proposal:

> The district court correctly found that Marwani Holding had shown a legitimate business rationale for the vote against the merger. To begin with, Marwani Holding did lack material information about the proposed merger and Medical Air had failed to provide Marwani Holding with the requested due diligence materials. Marwani Holding also had a suspicion, reasonable in context, that the deal was based on unrealistic assumptions that would ultimately doom it, and that it served only as a distraction from the real problems facing Medical Air. This suspicion was well-founded; Medical Air's CEO admitted at trial that the fourth quarter sales estimates for 1996 provided to Nortek were above what Medical Air had ever accomplished before and far exceeded its actual fourth quarter sales results. These reasons more than suffice to show a legitimate business reason for Marwani's vote.

Id. at 18a-19a.[2]

The Court of Appeals also rejected Medical Air's fiduciary duty claim on a wholly independent ground: lack of causation. Contrary to Medical Air's misstatements of the record evidence concerning the

---

[2] This record evidence of Marwani Holding's legitimate business reasons for voting against the Nortek merger contrasts with Medical Air's bare assertions that "Marwani Holding's selfish motivation and lack of consideration for the well being of Medical Air [are] uncontroverted," and that "Marwani Holding's President could not articulate a legitimate Medical Air business purpose for his vote." Pet. at 9, 15.

reasons for the failure of the Nortek merger — *e.g.*, that Marwani Holding's vote had "catastrophic effects" on Medical Air and "thwarted" the merger (Pet. at 9, 12), the Court of Appeals held that Medical Air's failure to meet its own fourth-quarter sales projections (and not the actions of Marwani Holding or any other defendant) led Nortek to renegotiate the potential purchase price and attempt to restructure the proposed deal, before Marwani Holding even voted on the merger:

> Nortek's CEO testified at trial (through deposition) that after Nortek saw the fourth quarter sales results [of Medical Air], it decided that it should pay less than was offered in the original letter of intent and reopened negotiations with Medical Air.... It is clear that Nortek was not willing to go through with the terms of the earlier proposed merger put before the Board that Marwani voted against. ***Even if Marwani Holding had voted for the proposed merger, it would have made no difference.*** Medical Air still would have been in the same position as it was after the January 8 vote, negotiating new terms with Nortek.

Pet. App. at 19a-20a (emphasis added). In other words, at the time of the vote in question, Medical Air asked Marwani Holding to approve a proposed merger that (unbeknownst to Marwani Holding) was no longer the proposal that Medical Air and Nortek were negotiating, and was not a proposal on which Nortek was willing to conclude a merger. Id. at 7a-8a.[3]

---

[3] Medical Air misstates the factual record below when it claims that "negotiations with Nortek were reopened" ***after*** the January 8, 1997 vote. Pet. at 6. As the Court of Appeals noted,

Therefore, because "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," the Court of Appeals held that Medical Air's fiduciary duty claim could be rejected for this reason alone. Id. at 20a.[4]

REASONS FOR DENYING THE PETITION

A. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT ANY ISSUE WORTHY OF SUPREME COURT REVIEW.

The Petition should be denied because (1) the judgment of the Court of Appeals rests entirely on principles of Massachusetts state law, (2) the questions presented in the Petition are not outcome determinative, (3) the Petition complains only of a purported misapplication of properly stated rules of law and erroneous factual findings, and (4) the sole federal question raised in the Petition was not decided by the Court of Appeals, and, in any event, does not require this Court's consideration.

Medical Air and Nortek reopened their negotiations on the day ***before*** the vote of Medical Air's shareholders. Pet. App. at 7a-8a.

[4] The Court of Appeals determined that this lack of causation also defeated Medical Air's claims for tortious interference and breach of the implied covenant of good faith and fair dealing, Pet. App. at 20a-21a, and further held that Medical Air's breach of contract claim is "no longer Medical Air's to make," because this claim was assigned to Marwan Investment when Marwan Investment purchased all of Medical Air's tangible and intangible assets at a foreclosure sale in November, 1998. Id. at 22a-23a. Although Medical Air did not appeal the merits of the District Court's rulings on these three claims, the Court of Appeals nonetheless addressed them only for purposes of Medical Air's appeal of the denial of a jury trial. Id. at 20a n.5.

1. The Judgment of the Court of Appeals Rests Entirely on State Law.

The principal aspect of the Court of Appeals' decision that Medical Air seeks to challenge in this Court is the First Circuit's application of settled principles of Massachusetts state law concerning the fiduciary duties owed by shareholders in a closely held corporation. This is apparent on the face of the Petition. See Pet. at 9-18. Although the Court of Appeals reviewed the "basic principles" applicable to an analysis of Medical Air's contractual jury trial waiver (Pet. App. at 12a-15a), the Court of Appeals ultimately found it unnecessary to apply these principles, because Medical Air's appeal could be resolved entirely on independent state law grounds. Id. at 15a. Accordingly, because the judgment of the Court of Appeals in this diversity action rests solely on principles of Massachusetts law, the Court of Appeals did not decide any federal question (let alone an important federal question) worthy of this Court's review.[5]

2. The Questions Presented in the Petition Are Not Outcome Determinative, As the Judgment of the Court of Appeals Rests on Independent Grounds.

Medical Air seeks to present two questions for this Court's review: (1) whether the Court of Appeals erred in affirming the District Court's judgment that Marwani Holding did not breach its fiduciary duty by voting against the proposed Nortek merger, and (2) whether the District Court erred in striking Medical

---

[5] Medical Air never contends that this issue of Massachusetts law presents a sufficiently important legal question to warrant the exercise of this Court's discretion to grant a writ of certiorari.

Air's jury demand (an issue which the Court of Appeals did not decide). Pet. at i.[6] However, because neither of these questions are necessary to determine the outcome in this case, this Court's consideration is not warranted.

As discussed above, although the Court of Appeals affirmed the District Court's finding that Medical Air had failed to establish at trial that Marwani Holding breached its fiduciary duty to Medical Air (Pet. App. at 15a-19a), the Court held that the District Court's judgment could be upheld in its entirety on an independent ground — lack of causation. Id. at 19a-20a. Based on its review of the evidence, the Court of Appeals held that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger" — the only purported injury advanced at trial by Medical Air. Id. at 20a. Therefore, even if Medical Air could show that the Court of Appeals erred in its application of Massachusetts law in finding that Marwani Holding did not breach its fiduciary duty, judgment nonetheless would have entered for Marwani Holding on this claim based on the failure of evidence on causation.

The Court of Appeals then held that, as a matter of law, Medical Air's inability to establish a causal link between Marwani Holding's vote and the

---

[6] In its statement of the "Questions Presented," Medical Air misstates the record below by suggesting that one question for this Court's review is "[w]hether the Court of Appeals erred in upholding the District Court's allowance of defendants' motion to strike plaintiff's jury claim as to all parties ...." Pet. at i. As set forth below, the Court of Appeals never decided this question. The Court of Appeals based its judgment solely on state law grounds.

failure of the Nortek merger also would operate to defeat two of Medical Air's claims that remained for trial (tortious interference and breach of the implied covenant of good faith and fair dealing) regardless of the resolution of the jury waiver issue, and rejected Medical Air's last claim (breach of contract) on a ground that Medical Air does not challenge in its Petition. Id. at 20a-23a. Accordingly, as the Court of Appeals' decision rests on grounds that are independent of the two questions presented in the Petition, Medical Air fails to present any issue worthy of this Court's review.

3. The Petition's Claims of Misapplication of Properly Stated Massachusetts Law and Erroneous Factual Findings Are Inaccurate and Would Not Merit This Court's Intervention Regardless.

Medical Air concedes that its challenge to the Court of Appeals' analysis of the fiduciary duty claim rests primarily on a purported misapplication — rather than a misstatement — of governing Massachusetts law. See Pet. at 9, 11 (asserting that Court of Appeals "misapplied" applicable law on fiduciary duty).[7] The Petition also seeks to relitigate

---

[7] Later in the Petition, Medical Air half-heartedly challenges the Court of Appeals' legal conclusion that, under Massachusetts law, a legitimate business purpose is not negated by the mere fact that this purpose coincides with a shareholder's self-interest (Pet. at 13; Pet. App. at 18a). As set forth below, see note 15 *infra*, the First Circuit correctly set forth and applied Massachusetts law on this point.

Further, although Medical Air contends that the *District Court* (not the Court of Appeals) "misstated applicable Massachusetts law" by articulating an "effective management" concept in its legitimate business purpose inquiry (Pet. at 11 n.4 (emphasis in original)), the language from the District Court

the facts bearing on this claim, for example, by taking issue with the Court of Appeals' conclusion that Marwani Holding had shown a legitimate business purpose for its vote against the Nortek merger (id. at 14-17), or that this vote did not cause the failure of the Nortek merger (id. at 12).[8]

The application of well-settled rules to disputed facts is not the type of situation in which this Court customarily intervenes, nor should it. See U.S. Supreme Ct. Rule 10. The central issue presented in the Petition — the case-specific determination of whether Medical Air offered adequate proof to establish a claim for breach of fiduciary duty — is a matter the Court of Appeals was well-equipped to

---

decision challenged by Medical Air is taken directly from a seminal Massachusetts Supreme Judicial Court decision addressing the fiduciary obligations of shareholders in close corporations. See Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850, 353 N.E.2d 657, 663 (1976) (noting that "untempered application" of strict good faith standard would "result in the imposition of limitations on legitimate action ... which will unduly hamper its *effectiveness in managing the corporation in the best interests of all concerned.*" (emphasis added)). The Wilkes Court adopted the burden-shifting framework discussed in section B *infra* to shield such "legitimate action" from scrutiny. See id. at 851, 335 N.E.2d at 663. Thus, far from "misstating" the law, by referencing the "effective management" concept the District Court evidenced its appreciation of the rationale underlying the legal standard.

[8] Indeed, unable to respond to the First Circuit's finding that "no reasonable jury could find ... a causal link between Marwani Holding's vote at the January 8 board meeting and the failure of the proposed merger with Nortek" (Pet. App. at 15a), Medical Air attempts to sidestep this critical finding by twice recasting it as "[t]he Court of Appeals determination that 'no reasonable jury could conclude' the Nortek merger was to occur ...." Pet. at 12 n.5, 20. Thus, not only does Medical Air seek to relitigate factual issues in this Court, but it also seeks review based on an alleged factual finding that the Court of Appeals never made.

address, and therefore does not require this Court's consideration.

4. The Court of Appeals Did Not Decide the Sole Federal Question Raised in the Petition, and the Question Does Not Require Resolution or Clarification in Any Event.

The Court of Appeals never decided the only federal question presented in the Petition — whether the District Court properly struck Medical Air's jury demand. The absence of any federal law-based challenge to the decision of the Court of Appeals is one reason for denying the Petition (see section A.1 *supra*), and Medical Air presents no countervailing reason for finding that the District Court's decision on the jury waiver issue warrants review by this Court. Medical Air does not assert that either the Court of Appeals or the District Court misstated the governing law. Medical Air also fails to identify any conflict between the District Court's decision and those of either this Court or the courts of appeal on the jury waiver issue. Nor is there any suggestion in the Petition that the analysis of Medical Air's contractual jury trial waiver presents an important or recurring question of law that has not been, but should be, settled by this Court.[9]

---

[9] Medical Air's suggestion that the District Court heard argument on the pending motion to strike Medical Air's jury demand "without warning" is not only irrelevant, but also ignores the procedural record. Pet. at 20. Respondents moved to strike Medical Air's jury demand on August 10, 2000, Medical Air submitted its opposition on September 5, 2000 (with a supporting affidavit and without any request for an evidentiary hearing), and Respondents filed a reply memorandum on September 12, 2000. The Respondents then identified this fully-briefed motion as a "pending motion" in their pre-trial status report to the District Court on November 17, 2000. Accordingly, it should have come as

At most, Medical Air complains only that the District Court made a factual error in finding that Medical Air "knowingly and intentionally" waived its right to a jury trial by contract. Even if the issue were relevant to the outcome of the Court of Appeals' decision, this case-specific factual determination by the trial court does not warrant the exercise of this Court's discretion to grant a writ of certiorari. See Pet. App. at 14a (noting that analysis of "voluntary and knowing" nature of waiver is "a fact-based inquiry").[10]

---

no surprise to the parties that when the District Court scheduled a hearing on a pending motion for summary judgment for ten days prior to the scheduled start of trial, the Court also requested argument on all other pending motions. In any event, Medical Air never even requested oral argument on the motion.

[10] Medical Air's discussion of this issue misstates the record. For instance, contrary to Medical Air's assertion "that there was no evidence before the court of a knowing and voluntary waiver" (Pet. at 19), the record below demonstrates that the Medical Air executives who negotiated the terms of Marwan Investment's and Marwani Holding's investment in Medical Air were experienced businessmen, who were assisted by counsel throughout these negotiations. Pet. App. at 4a. Further, the jury waiver provision was clearly and conspicuously set forth in an agreement that Medical Air considered so central to the parties' relationship that Medical Air selected only this agreement and two other documents from the closing binder for the transaction (out of the "over twenty documents" executed by the parties (Pet. at 2)) to attach as exhibits to its Complaint. Moreover, given that Medical Air acknowledges that its jury waiver is enforceable at least by Marwan Investment (see Pet. App. at 14a), Medical Air has necessarily conceded that this provision was conspicuous. Courts routinely cite such objective factors in concluding that a contractual jury waiver provision was entered into knowingly and intentionally, and thus is enforceable. See, e.g., Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988); Leasing Service Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986).

B. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

This Court's review is unnecessary for the additional reason that the Court of Appeals' rejection of Medical Air's breach of fiduciary duty claim is both legally and factually correct. Pet. App. at 15a-20a. The burden-shifting framework that the Court of Appeals articulated (id. at 15a-16a) is the appropriate legal standard. As the Court of Appeals recognized, shareholders in a Massachusetts close corporation owe a fiduciary duty of utmost good faith and loyalty. See Donahue v. Rodd Electrotype Co., 367 Mass. 578, 592-93, 328 N.E.2d 505, 515 (1975). Where a breach of this fiduciary duty is alleged, the burden is on the defendant to "demonstrate a legitimate business purpose for its action." Wilkes, 370 Mass. at 850-51, 353 N.E.2d at 663. If the defendant meets this burden, "no liability will result unless the [plaintiff] succeeds in showing that the proffered legitimate objective could have been achieved through a less harmful, reasonably practicable, alternative mode of action." Zimmerman v. Bogoff, 402 Mass. 650, 657, 524 N.E.2d 849, 853 (1988). Thus, there was no error of law.

Further, the trial evidence more than sufficiently supported the finding that Marwani Holding had legitimate business reasons to vote against the proposed merger — Marwani Holding "lack[ed] material information about the proposed merger" and "had a suspicion, reasonable in context, that the deal was based on unrealistic assumptions that would ultimately doom it, and that it served only as a distraction from the real problems facing Medical Air." Pet. App. at 18a-19a. At the time of the vote, Medical Air had refused for almost two months to honor Marwani Holding's repeated requests for copies of the due diligence materials that had been provided to Nortek. Id. at 5a-6a. Dr. Rahbany (Marwani

Holding's Agent) testified that, in his view, Marwani Holding had a duty as a shareholder of Medical Air to cast an informed vote on the Nortek proposal, which is why he requested copies of these due diligence materials. Id. at 5a, 8a.[11] Dr. Rahbany further testified that these materials would allow him to assess whether the proposed purchase price was based on credible representations and financial projections, and thus whether the Nortek proposal ultimately would be viable. Id. at 5a, 7a-8a.[12] He also explained why the viability of the Nortek proposal was important: given Medical Air's financial difficulties, it was preferable that Medical Air's management focus on improving the company's performance, rather than devote significant time and resources to negotiating a proposal with Nortek that might not be sustainable. Id. at 19a. As Dr. Rahbany testified, "Nobody buys your problems: you have to solve them."

This testimony amply supports the Court of Appeals' findings as to Marwani Holding's reasons for voting against the Nortek proposal. It was certainly reasonable (as the Court of Appeals found) for a shareholder — acting with the best interests of Medical Air and his fellow shareholders in mind — to vote against a transaction where he lacked basic information about the basis and viability of the proposed transaction. Id. at 17a-19a. Arguably, it

---

[11] Even after the vote, Marwani Holding continued to request information about Medical Air's negotiations with Nortek. Pet. App. at 9a.

[12] Further, Medical Air's decision to seek Marwani Holding's approval of the Nortek proposal, rather than proceed under the "Qualifying Price" certification provision of the ISA — pursuant to which Medical Air could have proceeded with a merger without such approval — led Dr. Rahbany to question further the sustainability of the proposal through the course of negotiations with Nortek. Pet. App. at 8a & n.1.

would be entirely inconsistent with a shareholder's fiduciary duties to vote in favor of such a significant transaction without knowing such material information about the proposal.[13]

Medical Air contends that the Court of Appeals should have placed greater weight on Marwani Holding's alleged "admissions" that its vote also served its own self-interests. Pet. at 16-17. Even if Medical Air's characterization of this testimony were accurate,[14] the Court of Appeals correctly determined that where, as here, challenged conduct serves the

---

[13] The judgment of the Court of Appeals also may be upheld on the alternative ground that, under Massachusetts law, Marwani Holding's vote on the proposed merger was not subject to the fiduciary duties ordinarily owed by shareholders in a close corporation. Those duties do not apply where the issue before the shareholders involves pre-approved procedures set forth in the company's organizational documents or stockholder agreements. See, e.g., Donahue, 367 Mass. at 598 n.24, 328 N.E.2d at 518 n.24 (heightened fiduciary duties are not implicated where "all other stockholders give advance consent to the stock purchase arrangements through acceptance of an appropriate provision in the articles of organization, the corporate by-laws ... or a stockholder's agreement"). The proposed Nortek transaction triggered the merger and stock-redemption procedures of the ISA and Medical Air's Amended Articles of Organization — which Medical Air chose not to, or otherwise failed to, follow. See Pet. App. at 6a-8a. Accordingly, under Donahue, because Marwani Holding's vote against the Nortek proposal was consistent with its agreed-upon rights, its vote was not governed by heightened fiduciary duties. See Donahue, 367 Mass. at 598 n.24, 328 N.E.2d at 518 n.24; Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 408, 649 N.E.2d 1102, 1105-06 (1995) ("when all the stockholders in advance enter into agreements," questions of fiduciary duty do not arise regarding conduct that falls within the terms of those agreements).

[14] The Court of Appeals expressly acknowledged this testimony, but found that it did not provide the conclusive proof of Marwani Holding's motivation that Medical Air attributes to it. Pet. App. at 8a-9a, 17a-18a.

interests of the corporation and of the shareholder, the "legitimate purpose" articulated by the shareholder "is not negated if [the shareholder's] vote also coincided with its self-interest." Pet. App. at 18a ("self-interest may be a proper motive for a stockholder's actions, so long as that interest does not result in acts in derogation of the stockholder's fiduciary duty").[15] As noted, Marwani Holding did not have sufficient information to assess whether the proposed merger was in the best interests of Medical Air, and thus voted against the proposal. At most, Medical Air suggests that Marwani Holding's own interests provided it with further reasons to vote against the proposed transaction. Given the alignment of these interests, Medical Air cannot claim that Marwani Holding breached its fiduciary duty simply by voting in accordance with both interests. As the Court of Appeals recognized:

---

[15] This statement is entirely consistent with the decisions of the Massachusetts Supreme Judicial Court addressing the fiduciary duties of stockholders in close corporations. See Blank, 420 Mass. at 408, 649 N.E.2d at 1105 (stockholders "may not act out of avarice, expediency, or self-interest *in derogation of* their duty of loyalty to the other stockholders and to the corporation" (emphasis added)); Wilkes, 370 Mass. at 850-51, 353 N.E.2d at 663 (majority stockholders "have certain rights to what has been termed 'selfish ownership' in the corporation which should be balanced against the concept of their fiduciary obligation"). The sole case cited by Medical Air to contradict the statement of the Court of Appeals — "This is not the law" (Pet. at 13) — is inapposite. In Merola v. Exergen Corp., even though the majority shareholder could not show a legitimate business purpose for terminating the employment of a minority shareholder, the Court nonetheless concluded that the termination did not give rise to a breach of fiduciary duty. See Merola v. Exergen Corp., 423 Mass. 461, 465-66, 668 N.E.2d 351, 354-55 (1996). Thus, Merola does not support Medical Air's suggestion that a legitimate business purpose is negated if the shareholder is acting both in the interest of the corporation and in his own self-interest.

> Admittedly, there may be tensions between the two types of interests — loyalty to the corporation and selfish ownership. *Difficult cases will arise where the dividing line is not clear. This is not one of those cases.*

Id. (emphasis added).[16]

Additionally, the evidence presented at trial is more than sufficient to support the First Circuit's conclusion that "[n]o reasonable jury could find that Marwani Holding's vote was the proximate cause of the demise of the proposed Nortek merger," which the Court of Appeals cited as a separate and independent ground for rejecting Medical Air's fiduciary duty claim. Id. at 19a-20a; see Clark v. Rowe, 428 Mass. 339, 345, 701 N.E.2d 624, 628 (1998) (to establish liability for breach of fiduciary duty, plaintiff must prove that alleged breach was proximate cause of damage). Nortek's Chairman and Chief Executive Officer testified that Nortek decided to renegotiate the purchase price and restructure the proposed

---

[16] The Court of Appeals concluded its analysis of the alleged breach of fiduciary duty by finding that Medical Air had not met its burden of showing that the legitimate business purpose articulated by Marwani Holding could have been achieved through a less harmful course of action. Pet. App. at 19a. Medical Air did not dispute the District Court's identical finding on this issue in Medical Air's submission to the Court of Appeals, and thus has waived any argument on this question before this Court. See United States v. United Foods, Inc., 533 U.S. 405, 417 (2001). In any event, the Court of Appeals correctly concluded that the alternative proposed by Medical Air — that Marwani Holding could have simply voted for the merger (Pet. at 17-18) — "is not a reasonable and practicable alternative," as it would not have resolved Marwani Holding's "legitimate concerns about what form the deal would ultimately take, or whether the whole deal was simply a chimera." Pet. App. at 19a.

transaction because Medical Air missed the fourth quarter sales projections that it had provided to induce Nortek's interest in the first instance. Pet. App. at 8a.[17] He also testified that Marwani Holding's vote on the proposed merger had no bearing on Nortek's decision to restructure the transaction with Medical Air, and that after Nortek reviewed Medical Air's fourth quarter sales results, Nortek was not willing to go forward with the transaction under consideration. Id. at 5a, 19a-20a.

The record below also supports the conclusion that Nortek's negotiations with Medical Air, including negotiations of the purchase price, were not finalized as of the date of the shareholder vote. For instance, even though Medical Air had represented to its shareholders that the draft merger documents submitted to them for approval "reflect the essential structure and framework of the merger," that structure and framework had changed substantially by the date of the shareholder vote, as Medical Air already had suggested to Nortek, in writing, "a restructuring of our agreement to include a performance consideration." In other words, on January 8, 1997, Medical Air asked Marwani Holding to approve a proposed transaction that (unbeknownst to Marwani Holding) Medical Air and Nortek were not even contemplating. Id. at 7a-8a, 19a-20a. Accordingly, as the Court of Appeals determined, the loss of the proposed merger was not, and could not have been, caused by Marwani Holding's failure to vote in favor of a proposal that, by the time of that

---

[17] Indeed, Medical Air at least occasionally concedes that Medical Air and Nortek reopened their negotiations "because Medical Air had failed to meet its fourth quarter projections." Pet. at 6.

vote, Medical Air and Nortek were no longer pursuing. Id. at 20a.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that this Honorable Court deny Medical Air's petition for a writ of certiorari.

Respectfully submitted,

MARY JO JOHNSON
Counsel of Record
JAMES W. PRENDERGAST
MICHAEL G. BONGIORNO
PETER J. KOLOVOS
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000

Counsel for Respondents